IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.73/2007.

SHRI. VINOD VILAS KENAUDEKAR
AND 3 OTHERS. .. Petitioner.

Versus

SHRI. HARISHALIAS SHRIKRISHNA
KENAUDEKAR AND 3 ORS. .. Respondents.

Mr. J. P. Mulgaonkar,Advocate for the appellants.

Mr. Sudin Usgaonkar with Ms.G. Kale, Advocates for the respondents No.1 & 2.

Coram :- **R. S. MOHITE, J.**

Date : - 27th September, 2007.

P.C. :

Heard both sides. This second appeal is from the concurrent findings of two lower Courts refusing the present appellant who was the original plaintiff, from raising an obstruction by an application under O.21,R.97 of C.P.C. The plaintiff had filed the suit for declaration that Gift Deed dated 19.5.1977 executed by the father of the plaintiff and the defendant by name Vaikunth in favour of the defendant was bad in law. In this suit, the original defendant filed a counterclaim seeking injunction and eviction of the plaintiff on the ground that apart from the Gift Deed, which was valid, the plaintiff had also sold his share to the defendant by sale deed dated 10th May 1977.

The trial Court dismissed the plaintiff's suit but decreed the counterclaim in part. While granting the prayer for injunction, the trial Court did not grant prayer of eviction sought by the defendant. The

appellate Court confirmed the dismissal of the suit but fully allowed the counterclaim of the defendant granting both prayers of injunction as well as eviction. It is not in dispute that the judgment passed by the appellate Court was not challenged further and become final. The trial Court had decided the suit/counterclaim on 25.2.2000. The appellate Court had decided the appeal on 13.3.2003. Thereafter, the original defendant filed execution proceeding.

In this execution proceeding, on 10.4.2004, the original plaintiff filed an application for obstruction under O.21,R.97 of C.P.C. on the ground that Vaikunth's wife had an individual right in respect of suit property that after her death her daughter on her death the grandson inherited a share. The grandson had executed a registered Gift Deed dated 28.12.1992 in favour of plaintiff. On perusal of the judgment of lower Court, said obstruction was disallowed on the ground that the alleged Gift Deed dated 28.12.92 had been executed during the pendency of the suit and therefore, was in the event antecedent to the decree. It was held that the principles of construct Res-Judicata would apply and since the said Gift Deed dated 28.12.92 was not relied upon in the written statement to the counterclaim and was not used as defence, such an objection could not be, for the first time, raised in the execution proceeding. On perusal of order passed by the lower Courts,it seems that the Courts have relied upon several judgments. In my view, 2 of the judgments support the view which has been taken by the lower Courts. In case of ***Tushar Suresh Bhumkar Versus M/s. Suresh & Company and another, reported on 2003,Vol.105(2) B.L.R., 223,*** this Court took the view that

> *"Issues in an enquiry U/s.47 must relate to the enforcement of the obligations created by the decree and must refer to the matters arising subsequent to the*

passing of the decree and not to the antecedent to it."

In this case, it cannot be disputed that execution of the registered Gift Deed 28.12.92 was antecedent to the passing of the decree.

In another case decided by the Apex Court in the case of ***Narindar Singh and others Versus Kishan Singh by L.R's andothers, reported in AIR 2002, S.C., 2603***, the Apex Court disallowed the objection raised in execution proceeding which was not raised during the pendency of the suit.

This judgment is also relied upon by the lower Court. In this view of the matter, I don't find any substantial question of law involved in the appeal. Hence, appeal is dismissed.

R. S. MOHITE, J.

SMA